

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts

DTE 01-31- Phase II
(Track A)

**MOTION OF AT&T FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR
LEAVE TO PRESENT EVIDENCE AND FILE BRIEFS REGARDING VERIZON'S
FAILURE TO COMPLY WITH THE DEPARTMENT'S PHASE I ORDER**

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Introduction

Pursuant to 220 CMR 1.06(6)(e), AT&T Communications of New England, Inc., hereby moves for summary judgment on Verizon's request for approval of its June 5, 2002, compliance filing ("*Compliance Filing*") as to the issue of whether there are retail business services, in addition to private line services, that are contestable on a UNE basis. Because Verizon has not presented facts which demonstrate that despite Verizon's use and commingling restrictions CLECs can use UNEs in a commercially reasonable manner to provide retail service, and because AT&T has presented undisputed facts demonstrating the inability of CLECs to use UNEs to contest Verizon retail business services, Verizon's request for approval of its compliance filing must be denied as to this issue. In the alternative, if there are disputed issues of material fact, AT&T hereby moves for hearings and briefing to resolve this important issue. Finally, AT&T also moves for summary judgment dismissing Verizon's compliance filing on the independent ground that Verizon failed to comply with the Department's requirement to reduce intrastate special access charges to UNE levels.

In Phase II, Track A, of this proceeding, the Department must decide whether Verizon's *Compliance Filing* complies with the Department's Phase I Order in this docket issued on May 8, 2002 ("*Phase I Order*"). The Department is faced with an issue that goes to the heart of one of the Department's Phase I Order requirements: the identification of "those retail business services, in addition to private line services, if any, that are not contestable on a UNE basis." *Phase I Order*, at 62, n. 39. The Department required the identification of such services in order to implement the sound policy pronouncement it made in its *Phase I Order*: Verizon retail pricing flexibility will result in efficient retail pricing only if Verizon's competitors can obtain, on the same terms and conditions as Verizon, the wholesale inputs necessary to compete with Verizon at retail. *Phase I Order*, at 61-62.

Verizon contends that there are no services that are not contestable by CLECs using UNEs. However, rather than presenting any facts to support this contention, Verizon instead argues that it is under no legal obligation to provide UNEs in the ways that are necessary to contest retail services. *See*, Verizon Massachusetts' Response To The Department's Supplemental Information Request, filed on October 15, 2002 ("*Verizon Supplemental Response*"). By contrast, AT&T has presented detailed and undisputed factual explanations on how several Verizon policies prevent CLECs from obtaining UNEs (both standalone and in combinations) necessary to compete with many of Verizon's retail business services. Further, AT&T has also identified the types of Verizon retail business services against which it and other CLECs cannot compete using such combinations of UNEs. *See*, DTE-ATT 1-1, Phase II. Indeed, as demonstrated below, Verizon's own E911 data of CLEC local exchange listings in Massachusetts show that the vast majority of the CLEC listings that Verizon relies upon to demonstrate local exchange competition are served over special access circuits and not over UNEs. As a result, the Department's UNE-based price floor standard will do little to protect new entrants from a Verizon price squeeze.

Because Verizon bears the burden of proof on the issue of whether its filing complies with the Department's Phase I requirements, its failure to present supporting facts is fatal to its request for approval of its compliance filing. Based on Verizon's evidentiary failure alone, the Department should deny Verizon's compliance filing as to this issue. The record, however, is even more compelling given the detailed evidence that AT&T has presented demonstrating the inability of AT&T and other potential competitors of Verizon to provide local business services using loop-transport combinations of UNEs and using loops combined with special access circuits.

In short, Verizon has presented no evidence that the Department's requirement for pricing flexibility – the contestability of Verizon retail services using UNEs – can be satisfied given the substantial restrictions that Verizon has placed on commingling and the use of the UNE combinations necessary to compete. This failure cannot be squared with the essential finding of the *Phase I Order*, specifically that Verizon retail pricing flexibility will result in efficient retail pricing only if Verizon's competitors can obtain, on the same terms and conditions as Verizon, the wholesale inputs necessary to compete with Verizon at retail. *Phase I Order*, at 61-62. As a result, its compliance filing as to this issue should be denied pursuant to this motion for summary judgment.

If the Department believes that there are material issues of disputed fact, AT&T moves that the Department establish a schedule for hearings so that all evidence related to these issues may be presented as sworn testimony subject to cross examination and an evidentiary record established as a basis for the Department's resolution of the disputed issues. When an intervenor has presented substantial evidence challenging Verizon's claim of compliance and a disputed issue of material fact exists, a Department approval of this aspect of Verizon's Compliance Filing in the absence of a record of competent evidence subject to cross examination violates the state Administrative Procedures Act. G.L. c. 30A, § 11; *Palmer v. Rent Control Board of Brookline*, 7 Mass. App. Ct. 110 (1979).

Argument

I. SUMMARY JUDGMENT IS APPROPRIATE WHEN THE PARTY WHO BEARS THE BURDEN OF PROOF FAILS TO PRESENT EVIDENCE ON AN ESSENTIAL ELEMENT.

As an initial matter, it is clear that the Department may grant summary judgment in the appropriate circumstances. The Department's procedural rules authorize the use of summary judgment. *See*, 220 CMR 1.06(6)(e) ("A party may move at any time after the submission of an

initial filing for dismissal or summary judgment as to all issues or any issue in the case.”). As the Department has stated:

Summary judgment may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd.*, 9 Mass. App. Ct. 775, 785-786 (1980); *see also Hess & Clark Div. of Rhodia, Inc. v. Food & Drug Admin.*, 495 F.2d 975, 985 (1974).

In determining whether to grant a motion for summary judgment, the Department will review the initial pleadings, pre-filed testimony, responses to discovery, and the memoranda of the parties. *IMR Telecom*, D.P.U. 89-212, at 12 (1990). The Department has stated that summary judgment is appropriate if a review of the materials on file shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cambridge Electric Light Company/MIT*, D.P.U. 94-101/95-36 (1995), citing *Re Altresco Lynn, Inc. /Commonwealth Electric Company*, D.P.U. 91-142/91-153, at 10 (1991).

Gaslantic Corp. v. Fall River Gas Co., D.P.U./D.T.E. 96-101 (May 6, 1999), at 11.

Under the standard for summary judgment in Massachusetts, a party moving for summary judgment in a case in which the opposing party bears the burden of proof at trial is entitled to summary judgment if it demonstrates by reference to the pleadings, discovery responses and other materials submitted in the case, that the party opposing summary judgment has no reasonable expectation of proving an essential element of his case. *Kourouvacilis v. General Motors*, 410 Mass. 706, 716 (1991). Citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986), the *Kourouvacilis* Court held that “[t]he burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party’s case.” *Kourouvacilis*, at 711. The moving party need not present evidence negating or disproving the essential element of the claim of the party on whom the burden of proof at trial will rest; the party seeking summary judgment is entitled to it if he demonstrates that affirmative proof of the essential element is unlikely to be forthcoming. *Id.* at 714.

As shown below, AT&T is entitled to summary judgment dismissing Verizon's compliance filing because:

? ? Verizon failed to produce any evidence that CLECs can use UNEs within the narrow limits set by Verizon's use and commingling restrictions in a way that allows them to provide competing retail services.

? ? Verizon failed to produce any evidence refuting AT&T's evidence that Verizon's "no facilities, no build policy" prevents CLECs from obtaining UNEs in situations where facilities are, in fact, available.

? ? As a matter of law, Verizon's failure to reduce intrastate special access charges to UNE levels does not comply with the Department's *Phase I Order*.

II. THE DEPARTMENT SHOULD GRANT SUMMARY JUDGMENT AND REJECT VERIZON'S COMPLIANCE FILING BECAUSE VERIZON FAILED TO SHOW THAT RETAIL BUSINESS SERVICES ARE CONTESTABLE USING UNES.

In its *Phase I Order*, the Department instructed "Verizon to identify in its Phase II filing, those retail business services, in addition to private line services, if any that are not contestable on a UNE basis" (*Phase I Order*, at 62, n. 39), because pricing flexibility would be inappropriate for such services. *Phase I Order*, at 61-62. With no serious consideration or factual support, Verizon asserted in its *Compliance Filing* that "all of Verizon MA's retail Business services can be replicated by competitors via UNEs." See, Compliance Summary ("*Compliance Summary*") portion of *Compliance Filing*, at 8. However, as explained in detail below, Verizon has never explained in this proceeding how CLECs can use UNEs to provide competing services *in the face of the restrictions that Verizon places on them*.

In stark contrast to the failure of Verizon to present any factual support, AT&T presented detailed evidence demonstrating its inability to use UNEs subject to Verizon's use restrictions.

In her August 24, 2001, prefiled testimony, Deborah S. Waldbaum explained at length why Verizon's UNE use restrictions preclude the use of UNEs to provide telecommunications services at retail to business customers. Ms. Waldbaum's testimony made clear that AT&T must purchase special access circuits, rather than UNEs, to provide any bundle of business services that has commercial viability. *See* Exh. ATT-3, Phase I, at 4. In other words, because of Verizon's UNE use restrictions, AT&T uses special access circuits to establish the transmission path to the customer premises to provide dial tone service and all business services ancillary to dial tone service. AT&T's use of special access circuits is not limited to business services that compete with Verizon's "private line" services.

Verizon's contention that there are no other business services that are not contestable with UNEs is accompanied by no factual support and flies in the face of Ms. Waldbaum's undisputed testimony in Phase I of this proceeding – testimony that Verizon never challenged by cross examination or by the filing of rebuttal testimony. Verizon's only response to AT&T's facts demonstrating the inability to use UNEs to compete is contained in the *Verizon Supplemental Response*. As demonstrated below, however, that response is simply a legal argument that Verizon has no obligation to provide UNEs in the ways that are necessary to contest retail services. Such an argument misses the point. Even if – *indeed especially if* – Verizon is entitled under existing regulations to prevent CLECs from using UNEs to provide a competing service, Verizon's retail services are not contestable using UNEs.¹ The relevant

¹ AT&T does not disagree that Verizon is currently permitted under the Department's decision in D.T.E. 98-57 to impose use restrictions. D.T.E. 98-57 (Phase I), Order, September 7, 2000, at 37. (As noted above, the point is not that Verizon is imposing the restrictions unlawfully; the point is that it is imposing the restrictions.) AT&T does, however, disagree with Verizon's contention that any modification of the way in which the restriction is applied or safe harbors defined would be in violation of the Telecommunications Act of 1996. *See*, discussion at 35-41, *infra*.

question is not whether Verizon is imposing the restrictions unlawfully; the point is that Verizon is imposing the restrictions, and thereby preventing CLECs from using UNEs to contest Verizon's retail business offerings. These restrictions have significant consequences for competitor access to wholesale inputs, and they ultimately create a situation in which retail pricing flexibility will not result in efficient retail pricing for those markets in which they apply.

A. AT&T DEMONSTRATED THAT CLECs ARE UNABLE TO USE UNEs IN A COMMERCIALLY FEASIBLE WAY TO PROVIDE COMPETITIVE LOCAL BUSINESS SERVICE.

1. Verizon's Restrictions on EEL Use And Commingling Prevent CLECs From Using UNEs To Compete With Verizon Business Services Provided On A DS1, Or Above, Level Facility.

AT&T's position is simple. CLECs need a connection between the end user and their switch in order to compete with Verizon for all retail business. Thus, they must obtain from Verizon both the loop that runs between the end user and the Verizon central office and the transport element that runs between Verizon's central office and their switch. For the reasons discussed below, Verizon's EEL use and commingling restrictions prevent CLECs from obtaining those two elements even when the CLEC intends to use those two elements to provide local exchange service to the end-user. As a result, CLECs are forced to purchase special access circuits to establish the connection between their switch and the end user premises.²

² As Ms. Halloran explained in DTE-ATT 2-1, Phase II, the circuit over which business services are carried is the same whether the circuit is running to a Verizon network location or to an AT&T network location. At the hearings in D.T.E. 01-34, Ms. Halloran provided a schematic diagram, marked in that case as AT&T Exhibit 9, that showed how bundled intra and interstate services are provided by Verizon and AT&T, respectively. (*See also*, Ms. Halloran's explanation, at D.T.E. 01-34, Tr. Vol. 3, at 432-434; *see also* DTE ATT 2-1, Attachment D, in Phase II.) The adverse competitive consequences flow from the fact that when the circuit is ordered to connect to an AT&T network location, Verizon's use and commingling restrictions force it to be ordered out of the federal tariff at inflated access rates. In contrast, when Verizon provisions a retail circuit to connect to a Verizon network location *to carry the same traffic with the same usage characteristics*, Verizon incurs only the economic cost of the circuit, estimated at TELRIC.

a. Verizon's Use Restrictions Prevent Competition For Business Services Provided On a DS1, Or Above, Level Facility.

Verizon denies CLECs the right to use combinations of loop and transport elements unless they can meet one of three “safe harbors.” None of the “safe harbors,” however, can be satisfied, even when the loop and transport element are intended to be used to provide local service. Each of the safe harbors and the reasons that they cannot be satisfied are set forth below.

The first “safe harbor” allows a carrier to convert facilities if it certifies that it is the *exclusive* provider of end user's local exchange service and the facility providing the service terminates in a collocation arrangement. This requirement cannot be met for several reasons. First, most business customers choose AT&T local service, or service from another CLEC, in order to take advantage of network diversity. These customers perceive an advantage in having service from *multiple* providers in order to ensure connectivity to the outside world even if there are temporary constraints or problems on any one provider's network. Indeed, this desire for network redundancy has been heightened by the events of September 11, 2001. Thus, end-users typically do not use AT&T (or any CLEC) as their sole local service provider. Exh. ATT-3, Phase I, (August 24, 2001 Waldbaum Testimony), p. 8. Moreover, as Ms. Waldbaum explained, they generally are reluctant (or would simply refuse) to disclose to one CLEC any information other than the fact that they have more than one local service provider. *Id.*

Any requirement that a customer use *only* AT&T service is simply contrary to the notion of competition. In order to qualify for this option, AT&T would have to require customers to purchase only AT&T local service in order to be eligible to receive AT&T's competitive service. AT&T would have to require customers to enter into exclusive contracts that could only be enforced by audits and litigation. And even then, the FCC prohibits such exclusive contracts for

the approximately one million commercial multiple tenant locations around the country.³ These methods simply would not be compatible with the notion of good customer relationships. In sharp contrast, ILECs can use the same UNEs to offer the same customer the same service without requiring exclusivity and still be assured that their costs will not change just because the customer has more than a single local service provider.

AT&T salespeople confirm that customers demand the flexibility to change both the amount of service purchased from any one provider and the number of providers they use, so they can obtain the most advantageous mix of service, quality and price. Exh. ATT-3 (August 24, 2001 Waldbaum Testimony), p. 8. These same customers also want to be able to make their purchase decisions without having to disclose whether they use other service providers. *Id.* As a result, AT&T is generally precluded from certifying, or even knowing, that it is (and will continue to be) a customer's only local service provider. Thus, the first safe harbor is, as a practical matter, simply unavailable to AT&T and other CLECs.

The second and third "safe harbors" cannot be satisfied for a different reason. These options require a carrier to certify that it provides local exchange and exchange access to the end user's premises at a particular level and in a particular configuration. The second option, for example, requires the carrier to handle at least one-third of the end user's local traffic measured as a percentage of total end user customer local dial tone lines. Under this option, the carrier must certify for DS1 circuits and above that 50% of the activated channels on the loop portion of

³ First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 2000 FCC LEXIS 5672 (rel. Oct. 25, 2000).

the facility have at least 5% local voice traffic, and the entire loop has 10% local traffic. In addition, the facility must terminate in a collocation arrangement, and the carrier may not connect the loop-transport combination to the ILEC's tariffed services (the so-called prohibition against commingling). Similarly, the third safe harbor requires a carrier to certify that at least 50% of the activated channels on a circuit are used to provide originating and terminating local traffic, and that 50% of the traffic on each local dial tone circuit must be used to provide local voice, and that 33% of the entire loop facility must be used to provide local voice traffic.

Both the second and third options, therefore, rely on the notion that usage is measured at the customer's premises as well as measured at the interface of each multiplexing function. However, this assumption is contrary to the capability of existing network design to measure usage. Exh. ATT-3 (August 24, 2001 Waldbaum Testimony), p. 10-11. For example, in the "EEL" configuration, the individual loops (which may be from a variety of locations in a local serving office) are multiplexed onto a higher capacity facility. Although the loops might each have distinct uses, at any one time any of those loops could be carrying all local traffic, no local traffic, or no traffic at all. Thus, any attempt to monitor that traffic would require the ability to monitor traffic at the end user's premise and at the point of multiplexing – neither of which are points where AT&T deploys equipment to record usage.⁴ ATT-3 (August 24, 2001 Waldbaum Testimony), p. 11. The only alternative would be substantial network reconfiguration that required the use of facilities that are restricted to a particular jurisdictional type of traffic. *Id.* Such a reconfiguration effort would be prohibitively expensive, both because it would be costly

⁴ While the usage can be captured at the switch, no means currently exists to associate that usage with a particular EELs configuration (as opposed to other loop configurations which would not be subject to monitoring) or the time slot that is employed for a particular customers call within a piece of equipment that is provided by the ILEC as a UNE. Beyond the preceding difficulty, the classification of usage as local versus non-local must still be overcome. ATT-3 (August 24, 2001 Waldbaum Testimony), p. 11.

to implement and because it would introduce substantial inefficiencies into AT&T's network operations.⁵ *Id.* Thus, it is infeasible to meet the second or third safe harbors.

b. Verizon's Commingling Restrictions Also Prevent Competition For These Business Services.

Verizon prevents CLECs from commingling unbundled network elements used to carry local exchange service traffic with tariff Special Access arrangements. Verizon's ban on the "commingling" of access and UNE traffic on the same facility is equally as burdensome as the use restrictions discussed above and further exacerbates the competitive harm caused by them. The commingling ban creates a huge competitive barrier, because it effectively requires CLECs to establish two parallel networks – one for local traffic and one for access traffic. Thus, it effectively prevents CLECs from converting access circuits to UNEs even when the CLEC is in fact using them to provide local service to the customer.

CLECs today provide local service using a combination of DS-1 channel terminations, multiplexing, and DS-3 transport, which they are forced to purchase out of interstate access tariffs. DS-1 loop facilities are typically associated with a single customer. As a result, in any given area, a CLEC such as AT&T may have some DS-1 loops that carry predominantly local traffic (for its local customers), and some that carry only special access traffic (for customers purchasing its long-distance but not its local service). However, higher capacity transport and multiplexing facilities – the most efficient way to aggregate traffic – almost always carry some traffic that is eligible for conversion to UNEs and some that (inappropriately) is not. As a result, the commingling ban effectively prevents a CLEC from converting any special access circuits to

⁵ For further explanation for why the safe harbor requirements assume an ability to measure usage that is inconsistent with current network design, *See* Exh. ATT-3, Phase I, (August 24, 2001 Waldbaum Testimony), p. 12-14.

UNEs, unless it is willing to establish separate and parallel networks in the central office – one for access traffic and one for UNE traffic.

These restrictions have absolutely no technical basis, are discriminatory and anti-competitive, deprive CLECs of comparable efficiencies of scale and scope, and serve no conceivable purpose other than to protect the Verizon's monopoly. Verizon, which faces no comparable restriction, is permitted to place any traffic on any facility, thus enabling it to achieve economies of both scale and scope in designing their networks. In sharp contrast, the commingling ban requires CLECs to adopt an extremely inefficient network architecture if they even attempt to use loop-transport combinations of UNEs.

c. As A Result of Verizon's EEL and Commingling Restrictions, Most Of The Services That Verizon Lists Under Tab C Of Its *Compliance Filing* Are Not Contestable Using UNEs.

As a result of Verizon's EEL and commingling restrictions, therefore, most of the services that Verizon lists under Tab C of its *Compliance Filing* are not contestable using UNEs. As Ms. Halloran and Ms. Waldbaum explained in response to Department discovery, Tab C services that require DS1 or above level connectivity and cannot be provisioned over the UNE-platform require that connectivity between the AT&T switch and the end-user be established using the combined loop and transport functionality. DTE-ATT 1-1, D.T.E. 01-31 (Phase II). Because of the EEL use and commingling restrictions, AT&T must purchase special access circuits, rather than a loop-transport combination, to obtain that connectivity. DTE-ATT 1-1, D.T.E. 01-31 (Phase II), pp. 4-5. Accordingly, CLECs cannot obtain UNEs, and must use special access circuits, when competing with Verizon services provided on DS1 or above

facilities.⁶ As the Department has determined in its *Phase I Order*, efficient retail pricing will not result if CLECs are unable to obtain UNEs to compete.

2. Verizon’s “No Facilities, No Build” Policy Also Interferes With Using UNEs To Contest The Services Listed In Verizon’s Tab C.

Frequently, Verizon will unilaterally declare that the network element is not available, based on its own definition of “no facilities,” and that it has no obligation to build the network element for AT&T, or other CLECs. DTE-ATT 1-1, D.T.E. 01-31, (Phase II), p. 2. For example, Verizon will declare facilities not available, when copper facilities are in fact available, because Verizon has a policy of using fiber in the circumstances associated with a particular order. At the same time, Verizon will offer to build the network element to fill a special access order at inflated access prices. *Id.* In contrast, Verizon will readily build the network element to fill its own retail order, incurring a significantly lower cost than the inflated access price it charges AT&T for the same network facility. *Id.* Verizon’s forcing of CLECs to pay special access charges for the same facilities that Verizon uses at a substantially lower cost is the very problem that the Department was concerned about in its *Phase I Order*. The Department found that, when Verizon’s retail prices are deregulated, the only way that CLECs will be able to prevent Verizon from raising its retail prices above economically efficient levels is to ensure that CLECs can obtain the wholesale inputs necessary to provide a competing service at TELRIC rates. *See, Phase I Order*, at 61-62. Verizon’s overly broad and unilaterally determined definition of “no facilities” (which then triggers its “no-facilities, no build” policy) prevents

⁶ It should be noted that Verizon has had many opportunities to identify the specific services that it offers on DS1 facilities, so that the Department can determine which specific business services are not contestable on a UNE basis. Indeed, AT&T asked Verizon a series of discovery questions to elicit that information. Verizon has declined to provide it. *See, Verizon’s responses*, filed on September 24, 2002, to AT&T’s First Set of Information Requests in Phase II.

CLECs from exerting the necessary downward pressure on Verizon's prices when CLECs must pay inflated access charges for the special access circuits they must buy each time Verizon asserts its policy. It also has the potential to put CLECs in a price squeeze situation if Verizon were to reduce its retail prices as an anticompetitive move.

In short, Verizon's "no facilities-no build" policy is a separate, independent reason why CLECs are unable to compete using UNEs in many instances. As a result of this policy, Verizon is able to force CLECs to purchase higher price special access circuits instead.

3. The Lack Of Cost-Effective Mass Migration From UNE-P to UNE-L Prevents CLECs From Using UNE-L To Compete Against Verizon Business Services That Are Carried On A DS0 Circuit.

Currently, AT&T is able to provide basic business services on a DS0 level loop to small business customers using UNE-P. For these services – and for these services only – AT&T does not need to obtain an EEL to provide local exchange service in competition with Verizon. Thus, for these services, Verizon's use and commingling restrictions and Verizon's "no facilities, no build" policy do not interfere with the ability of CLECs to obtain UNEs. It is for this reason that AT&T agreed that Verizon basic business services that can be delivered on a DS0 level facility are potentially contestable using UNEs. DTE-ATT 1-1, (Phase II), p. 4, 6; DTE-ATT 2-2, (Phase II), at 3. Such services are contestable, however, only as long as the Department remains steadfast in requiring Verizon to provide UNE-P at TELRIC prices without limitation. DTE-ATT 1-1, (Phase II), p. 6, n. 7. As Ms. Halloran and Ms. Waldbaum stated:

[T]he availability of UNE-P is a necessary predicate for the contestability of Verizon's small business services (services provisioned on POTS/VG/DS0 level facilities). If the Department were to grant in this docket Verizon pricing flexibility for POTS/VG/DS0 level services to business on the ground that they are contestable using UNEs, then the Department must ensure that this condition precedent be maintained as well.

DTE-ATT 1-1, (Phase II), p. 6.

The availability of UNE-P alone, however, does not provide as much pressure on Verizon's retail prices as a combination of UNE-P and UNE-L based competitors. AT&T would like to reduce its dependence on UNE-P and rely more on UNE-L as a means of using as much of its own network as possible. DTE-ATT 1-1, (Phase II), p. 3. In the case of small business customers, for example, AT&T's original plans called for the use of AT&T switching combined with a Verizon unbundled loop. DTE-ATT 1-1, (Phase II), p. 3. However, after a significant effort, AT&T determined that UNE-L was not commercially viable in large part because of the expensive and inefficient, one-at-a time, hot-cut process required to obtain customers in the first place. DTE-ATT 1-1, (Phase II), p. 3-4 ("the individualized, customer-by-customer nature of the process made it both so cumbersome that AT&T's customers found it unacceptable and so expensive that it was not economically viable"). AT&T's fall back plan was to acquire the customers on a UNE-P basis and then convert to UNE-L on a project basis. Even that process, however, has proven commercially infeasible. As Ms. Halloran and Ms. Waldbaum stated:

AT&T had hoped to begin using an alternative method of acquiring customers (*i.e.*, using UNE-P and then converting those customers to UNE-L). The unavailability of a forward-looking, high-volume customer cutover process at forward-looking TELRIC prices, however, has made this plan unworkable. Given these circumstances, AT&T is not able to contest Verizon's small business services in reliance on unbundled loops.

DTE-ATT 1-1, (Phase II), p. 4.

Unless CLECs have the ability to migrate customers to their own networks easily, economically and without risk of service loss (*i.e.*, a process like electronic loop provisioning that would be transparent to the end-use customer), UNE-P will remain essential to compete in this sector of the market. Further, the transition of those customers from UNE-P to UNE-L will continue to be impractical unless a high volume, cost-effective, migration process is made available.

Such a process is possible, and has been used in New York and by at least one CLEC in Massachusetts. AT&T has already described it in *AT&T's Motion For Partial Reconsideration And Clarification* (at 23, 29-32), filed on August 14, 2002, in D.T.E. 01-20. This procedure starts by using UNE-P to provision a new customer. Customers remain on UNE-P until a critical mass of such customers is achieved in a central office, at which time a large group of such lines in a single CO are converted from UNE-P to UNE-L and connected to the CLEC's collocation facility and from there to the CLEC's switch. This high volume cutover process can be done far more efficiently than the conventional process. Typically, the cutovers can be done at night, when the risk of possible service disruptions is minimized. Use of new software and special project management procedures allow hundreds of lines to be cutover in a single night within a given central office, without the need for Verizon's Regional CLEC Coordination Center to coordinate each cutover separately across multiple central offices. The process is greatly simplified by scheduling a larger volume of UNE loop cutovers in a single central office on a single date, rather than coordinating cutover dates and locations for each individual UNE loop with cutovers in different central offices all being coordinated simultaneously. Furthermore, by focusing on a group of UNE loop cutovers in a single central office, Verizon technicians can make all the necessary cross-connections more efficiently in that central office. The result is that the time it takes to prepare and provision each UNE loop on a per line basis, and the associated cost per loop, are reduced dramatically.

The problem is that, notwithstanding the availability of such a process, Verizon does not make it generally available and has refused to offer it at TELRIC rates. Verizon's position, therefore, has left CLECs with the current hot cut process – a process that the Department recognized in its July 11, 2002, order in D.T.E. 01-20 ("*D.T.E. 01-20 Order*") as having adverse

commercial and economic implications. In the *D.T.E. 01-20 Order*, the Department “direct[ed] Verizon to examine carefully the components of the hot cut process and to develop a less costly alternative for CLECs that Verizon would offer as an alternative to the hot cut process modeled in Verizon’s [non-recurring cost model].” *D.T.E. 01-20 Order* at 499. In its motion for partial reconsideration and clarification of that order, AT&T noted that Frame Due Time is still a time-consuming, line at-a-time process and therefore asked the Department to clarify that Verizon’s examination include collaborative work with interested CLECs to define and estimate the cost of a forward-looking, high-volume customer cutover process. *AT&T’s Motion For Partial Reconsideration And Clarification* (at 23, 29-32), filed on August 14, 2002, in D.T.E. 01-20. *See also, Reply Comments In Support Of AT&T’s Motion For Partial Reconsideration And Clarification* (at 15-19), filed on September 6, 2002, in D.T.E. 01-20. However, until a forward-looking, high volume customer cutover process is in place and TELRIC based non-recurring rates are charged for it, UNE-L is not economically viable and therefore does not place competitive pressure on Verizon.

In summary, it is only the continued availability of UNE-P that allows the market for basic business services offered on a DS0 level loop to be contestable on a UNE basis. Contestability on this basis is not sufficient, however, to bring to bear the full beneficial effect of competition on Verizon’s retail prices. More facilities-based competition is necessary for that. Yet, such competition cannot develop as long as Verizon fails to implement a cost-effective mass migration procedure from UNE-P to UNE-L.

4. The Need To Overcome Each And Every One Of Verizon’s Obstacles Places A Near Impossible Burden On The Use Of UNEs To Compete.

Verizon’s restrictions and policies place a number of different obstacles in front of any attempt to obtain UNEs to contest specific retail markets. As part of AT&T’s response to DTE-

ATT 1-1 in Phase II, Ms. Halloran created two diagrams to display the difficulties in obtaining UNEs to compete in (1) the market for small services provided on DS0 level loops and (2) the “mid to global” markets for services delivered on DS1 and above level facilities, respectively. *See*, Corrected Attachment C, filed on October 4, 2002 (attached hereto as Exhibit “A”).

As the diagrams make clear, the inability to clear even one of the many obstacles that Verizon places in front of its competitors prevents a CLEC from obtaining UNEs necessary to compete. For example, a CLEC desiring to serve a mid to large size business customer must first determine whether it has a collocation arrangement at the Verizon central office serving that customer. *See*, DTE-ATT 1-1, D.T.E. 01-31, (Phase II), Corrected Attachment C (2 of 2). If it does not have a collocation arrangement in that office, the only way that it can serve the customer is by obtaining a loop-transport combination from Verizon. If, however, the use restrictions cannot be satisfied, then service cannot be provided using UNEs. (Follow the “no” lines through the box labeled “Customer’s Use Passes EELs Use Restrictions” to the “Not Contestable With UNEs” box.) If there is a collocation arrangement in the central office, then the commingling restrictions will prevent the use of a UNE-loop if the transport facility back to AT&T’s switch from the central office has been procured under the special access tariff. In that case, UNEs are not available to serve the customer due to Verizon’s prohibition against commingling.

Next, if the EEL use restriction does not preclude the use of EELs and the commingling prohibition does not preclude the use of a loop, then facilities must be “available” as unilaterally defined by Verizon. If they are available, then the CLEC can compete with Verizon using UNEs. However, if they are not available, then the CLEC must obtain the circuit under Verizon’s special access tariff. In such situations, CLECs are left to compete with Verizon using

special access circuits indefinitely, unless and until Verizon provides a “TELRIC based, non-disruptive process to convert special access to UNEs” (see box labeled accordingly) – a process that Verizon has not yet provided.

Finally, as Ms. Halloran’s diagram indicates, in the rare circumstances where a CLEC is able to make it to the point where it has obtained UNEs needed to contest Verizon business services to large and medium size business, the cost and delay of getting to that point has already disadvantaged the CLEC in comparison to the resources that Verizon must expend to reach that point with its own customers.

The problems faced by CLECs seeking to use UNE-loops to serve small business customers are different but have the same effect in preventing the use of UNEs to compete. In order for a CLEC to serve this market with a UNE-loop, Verizon must first be willing to state that the “facilities are available.” If they are not, then the CLEC is out of luck. If facilities are “available” as defined by Verizon, then there must be a customer friendly process for effecting a hot cut of the loop from Verizon to the CLEC. If there is not, then the CLEC must use UNE-P as the transitional method for acquiring the customer. If UNE-P is not available, then there will be no way for the CLEC to reach a point where it can provide service to the customer on the basis of UNE-L. If UNE-P is available, then the CLEC must ensure that it has satisfied any line limits for UNE-P that Verizon may in the future impose. If those obstacles are cleared and the CLEC has acquired a number of small business customers on a UNE-P basis, then UNE-L is still not a viable option unless Verizon has available a customer friendly mass migration process for which it charges a TELRIC based non-recurring charge. Only if such a process is available at TELRIC rates and all the other conditions described above are satisfied, is the market for small business services contestable on a UNE-L basis.

Ms. Halloran's diagrams present graphic evidence of the difficulty of using UNEs to compete with Verizon's business services. Moreover, the obstacles that Ms. Halloran's diagrams depict demonstrate why the vast majority of the CLEC business listings in the E911 database are not served using UNEs. In short, AT&T's evidence is overwhelming: with the exception of small business services offered on a DS0 level loop, Verizon's business services are not contestable using UNEs. Moreover, small business services are contestable using UNEs only due to the availability of UNE-P. They are not contestable using UNE-L due to the unavailability of a customer friendly mass migration process.

5. Verizon's Own Data Demonstrate That The Cumulative Effect Of Verizon's Policies Is To Prevent CLECs Using UNEs To Bring Full Competitive Pressure On Verizon's Pricing Power.

The evidence of competitor lines that Verizon submitted in this case in support of its claim that there is local competition is comprised substantially, if not primarily, of local exchange lines that competitors are serving using special access circuits. Verizon identified 555,000 E-911 listings for CLEC customers. No party in this proceeding disputes that these represent local exchange listings. Verizon then identified 85,000 UNE loops, which it subtracted from the 555,000 CLEC lines. Verizon assumed – erroneously – that the remaining 470,000 lines are served by full facilities-based CLECs. Exh. VZ-1 (Testimony of Robert Mudge, filed on April 12, 2001), p. 12, lines 13-16, and pp. 16-17. Verizon was later forced to admit that the 470,000 CLEC switch lines are comprised of lines served over special access circuits as well as lines served over CLEC facilities. Phase I Tr. 12/19/01 at 192-193, 209 (Conroy).

Verizon, however, never identified full-facilities based CLECs offering local business services that could account for any of those 470,000 CLEC lines. In an effort to support its contention that the 470,000 lines represent full facilities based carriers, Verizon pointed to AT&T Broadband as an example of a CLEC that could account for some of the 470,000 lines.

Exh. VZ-1 (Testimony of Robert Mudge, filed on April 12, 2001), p. 12, lines 17-22. AT&T Broadband, however, is a cable company with a facilities-based network in place to provide cable television to residential customers. Tr. 1/3/02, Phase I, at 655 (Fea). It does not have a footprint that allows it to provide retail service to businesses generally. In fact, Verizon never identified any CLEC which has a fully developed, ubiquitous network that allows it to offer services over its own network to business customers. Thus, the vast majority of the approximately 368,000 CLEC local *business* listings in the E911 database, *obtained after removing UNE-loops*, are served on facilities that CLECs obtain from Verizon.⁷ Because such facilities are not obtained as UNEs (UNE-loops have been subtracted out), they are obtained as special access circuits.

If Verizon's use and commingling restrictions and its other policies were not preventing CLECs from obtaining UNEs, then the numbers would be quite different. CLECs would not be using high priced special access circuits to provision service for up to 368,000 lines and using lower priced UNE-loops to provision service to only 85,000 lines. The vast majority of the E911 listings, which Verizon uses as the measure of local service, are provided using special access circuits.⁸ Clearly, Verizon's EEL use and commingling restriction are forcing CLECs to use special access circuits to provision local service.

⁷ There are 555,000 CLEC listings in the E911 database. After subtracting 85,000 UNEloops, there are 470,000 CLEC listings representing lines that could be served either by a full facilities based carrier or over a special access circuit. In order to estimate the number of those lines that are business lines, the percentage of total CLEC lines serving businesses was calculated from DTE-VZ 2-11 (666,200 divided by 851,000 = 78%) and applied to the 470,000. Thus, approximately 78% of the 470,000, or 368,000, lines serve businesses.

⁸ Given CLEC reliance on special access circuits to provide local exchange service, AT&T appreciates the Department's effort to address the problem by requiring Verizon to reduce intrastate special access rates to TELRIC levels. Unfortunately, under Verizon's current methods and procedures for ordering special access circuits, AT&T and other CLECs must order the vast majority (over 99%) of special access circuits out of the federal tariff. DTE-ATT 2-1, Phase II. CLECs will not be able to purchase special access circuits under state tariff even though such
(continued...)

While Verizon's E911 database may have identified some limited degree of local exchange competition, it did not identify competition capable of exerting downward pressure on Verizon's local exchange retail prices. Moreover, the competition disclosed by the E911 database, because it relies on special access circuits, is not protected by the UNE-based price floor standard that the Department announced in its *Phase I Order*, at 91.

B. VERIZON PRESENTED NO FACTUAL EVIDENCE DEMONSTRATING THAT ITS RESTRICTIONS AND POLICIES DO NOT PRECLUDE THE USE OF UNES TO PROVIDE LOCAL BUSINESS SERVICES.

1. Verizon's Legal Argument That It Can Impose EEL Use And Commingling Restrictions Is Not Evidence Demonstrating That CLECs Can Use UNES To Compete.

In *Verizon Supplemental Response*, Verizon sets forth its response to AT&T's position that CLECs cannot use UNES to compete with Verizon's retail business services. Verizon begins with citations to Department, FCC, and court decisions to make the irrelevant point that Verizon currently has the right to impose the debilitating restrictions. *Verizon Supplemental Response*, at 2-3. As AT&T noted above, Verizon's retail services are not contestable using UNES *precisely because* Verizon can under existing regulations prevent CLECs from using UNES to provide a competing service.

Verizon continues with equally irrelevant assertions that its "use and commingling restrictions do not apply to standalone UNES (*e.g.*, a loop delivered to a CLEC collocation arrangement)", and that its "use and commingling restrictions do not apply to UNES that are combined by a CLEC." *Verizon Supplemental Response*, at 4-5. These assertions do not hold up

(continued...)

circuits will carry the same traffic and services as the circuits Verizon provisions to its retail customers under its retail state tariff. *Id.*

to serious scrutiny. First, the availability of standalone UNEs is irrelevant to CLECs without collocation arrangements in every Verizon central office which require a loop-transport combination in order to connect the end user to their network. Indeed, the FCC has recognized the critical importance of this combination when it decided to remove the obligation of ILECs to provide switching as a UNE to end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas “*where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL)[.]*” *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 3696 (1999). (“*UNE Remand Order*”), at ¶ 253 (emphasis added). Because DS1, and above, level circuits are typically used to provide service to end-users with more than four lines, CLECs require combinations of loop and transport to compete in that market, and it is no answer to say that the CLECs could obtain the UNEs individually.

Second, even if a CLEC has a collocation arrangement in the Verizon wire center serving an end user and has the capability of combining the transport element and the loop element in the collocation arrangement, Verizon’s commingling restrictions prevent the CLEC from making use of existing interoffice transport used to carry long distance traffic. Because of the prohibition on commingling, a CLEC cannot use a standalone loop if the traffic over it is brought back to the CLEC’s network using spare capacity in transport facilities carrying long distance traffic. Thus, it is simply not true that CLECs can use a standalone loop without restriction. The only way that CLECs can use a standalone loop is to purchase a redundant transport element.

Third, nowhere in *Verizon Supplemental Response* does Verizon make clear what it means by “standalone loops.” If Verizon defines a “standalone loop” as one that does not include any multiplexing function at the collocation arrangement, then Verizon’s claim that it provides

standalone loops without imposing its usage requirements is an empty one. Most loops that AT&T obtains from Verizon must be multiplexed up to a higher level before they can deliver traffic to AT&T's collocation cage for transport back to AT&T's switch over AT&T owned transport facilities. Under Verizon's current tariff in Massachusetts, Verizon defines the multiplexing function as a separate element. *See*, Tariff 17, Part B, Section 3.1.1(A)(1). Thus, in the absence of a clear statement from Verizon that the standalone loop it is willing to provide to CLECs without usage restrictions includes the multiplexing function, the Department cannot assume that usage restrictions do not apply to loops that CLECs order outside of EEL arrangements. Indeed, in response to a recent AT&T request for standalone loops in Massachusetts, Verizon has refused to provide them on the ground that the required multiplexing function at the end of the loops violates Verizon's prohibition against commingling.

After its irrelevant claim in *Verizon Supplemental Response* that CLECs can use standalone loops, Verizon purports to provide several reasons for the Department to reject AT&T's position that CLECs cannot use combinations of UNEs necessary to compete with Verizon retail business services. *Verizon Supplemental Response*, at 6-9. Verizon claims that: (1) AT&T has provided no support that the "safe harbors" cannot be satisfied and refers to a WorldCom letter that has never been produced in this proceeding; (2) AT&T's proposal contravenes Department precedent as well as testimony of an AT&T witness in another proceeding; and (3) the Department cannot "override" the FCC's safe harbor rules, notwithstanding the fact that the New York Public Service Commission has. None of Verizon's "reasons" include any factual evidence that AT&T or any potential competitor is able to use UNEs in combinations that permit it to offer a retail service that competes with Verizon.

First, Verizon's claim that AT&T has provided no support for its contention that the "safe harbors" cannot be satisfied is a willful misstatement of the record. Indeed, it is a continuation of Verizon's efforts to ignore Ms. Waldbaum's testimony. As AT&T noted in its initial brief in Phase I, Verizon's response to Ms. Waldbaum's testimony was "deafening silence." *AT&T Initial Brief*, Phase I, at 29. Verizon presented no evidence in response; indeed, Verizon did not even cross examine Ms. Waldbaum on that issue. The *Verizon's Supplemental Response* continues to reflect Verizon's strategy of turning a blind-eye to the truth in the hope that it will go away. Such a strategy, however, does not produce evidence that is competent to defeat a motion for summary judgment (or support any Department decision or order).

Verizon's reference in *Verizon Supplemental Response*, at 6, to a so-called WorldCom letter does not produce competent evidence rebutting Ms. Waldbaum's testimony submitted in this proceeding and subject to cross examination. Verizon did not even produce the letter. Verizon's submission to the Department is a Verizon letter characterizing the WorldCom letter to suit its own purposes. *See, Verizon Supplemental Response*, Attachment A. Indeed, it is not even possible to determine from Attachment A what exactly it was that WorldCom stated, or in what context. Such a characterization of what another party said in another proceeding is more remote and unreliable even than double hearsay. It is not competent to rebut Ms. Waldbaum's testimony. *See, Covell v. Dept. of Social Services*, 54 Mass.App.Ct. 805, 815-816 (2002) (rejecting hearsay evidence as unreliable because agency never evaluated credibility of witness and testimony not corroborated.)

Verizon's second reason also does not present a factual issue for the Department to resolve in a hearing. Here again, Verizon does not produce facts that show CLECs have the ability to satisfy its safe harbor requirements and use UNEs to compete with Verizon's retail

business services. Verizon's second reason is comprised of the irrelevant legal argument that the Department has permitted it to impose the use restrictions with the FCC sanctioned safe harbor requirements and the factually irrelevant point that an AT&T witness at one time held the opinion that the FCC was capable of reaching an informed decision. Neither point produces evidence that creates a factual dispute necessary to defeat a motion for summary judgment.

Verizon's third reason suffers from the same problem as the first two. Verizon argues that, notwithstanding the New York Public Service Commission's approval of an alternative set of safe harbor provisions to those blessed by the FCC, the Department cannot do the same. While AT&T disagrees with Verizon on this point and presents its reasons below (*see*, discussion, at 35-41, *infra*), the Department need not decide that issue in order to rule on AT&T's motion for summary judgment. The issue raised by AT&T's motion is whether there are disputed issues of fact as to CLECs' ability to use UNEs in a commercially viable combinations to compete with Verizon's retail services, not whether the Department has the right to order a different set of safe harbors. As to AT&T's motion, the record reflects AT&T's evidence demonstrating an inability of CLECs to use UNEs to compete, and an absence of evidence from Verizon demonstrating that its use restrictions do not preclude the use of UNEs to compete.

2. Verizon's Legal Argument That It Can Refuse To Provide UNEs When It Unilaterally Determines That Facilities Are Not Available Is Not Evidence Demonstrating That CLECs Can Use UNEs To Compete.

Verizon's response to AT&T's evidence regarding Verizon's "No Facilities, No Build" policy suffers the same flaw as its response to AT&T's evidence on use and commingling restrictions: it is beside the point.

AT&T's evidence demonstrates that Verizon refuses to provide UNEs when its facilities are not available, as unilaterally determined by Verizon. AT&T's evidence also shows that Verizon's determination that the facilities are not available sometimes includes situations where such facilities are physically available (*e.g.*, copper loops), but Verizon nevertheless determines that they should not be used on account of other Verizon policies (*e.g.*, policy to migrate from copper to fiber in certain situations). VZ-ATT 2-4, D.T.E. 01-34. AT&T's evidence then shows that Verizon will provide the facilities to AT&T but only if AT&T pays Verizon inflated special access rates. DTE-ATT 1-1, D.T.E. 01-31 (Phase II).

It is striking that, in the *Verizon Supplemental Response*, Verizon does not deny AT&T's claims. It merely states that it has a right to refuse to provide UNEs in such situations without ever addressing the fact that AT&T alleges: Verizon's determination that facilities are not available based on internal policies (*e.g.*, an internal policy of provisioning over fiber when copper is available) when facilities are, in fact, available.⁹ In any event, regardless of whether or not Verizon is abusing its right to refuse to provide UNEs when facilities are "not available," the fact remains that such a policy prevents CLECs from obtaining UNEs to contest retail services.

Moreover, contrary to Verizon's contention and as a matter of self-evident logic, it is not true that "the absence of available facilities for use as UNEs would place AT&T, or any CLEC requesting such facilities, in exactly the same competitive position as Verizon MA." *Verizon Supplemental Response*, at 11. When the facilities are "not available," Verizon incurs less than

⁹ Most of Verizon's discussion is entirely irrelevant to AT&T's claim; it is an extended, but irrelevant discussion to the effect that, when facilities are available, it will provide UNEs (*e.g.*, high capacity loops). The issue, however, is what Verizon does – and does not do – when it unilaterally determines that facilities are *not* available.

the TELRIC cost of constructing them. When CLECs must purchase those facilities under the special access tariff, they incur the substantially greater cost of purchasing the facilities at inflated special access rates. Thus, Verizon's policy of refusing to provide the facilities at TELRIC rates to its competitors has a significant anticompetitive effect on CLECs. Even more important in this case, Verizon's refusal to provide the facilities at TELRIC rates and to charge special access rates instead ensures that CLECs will not be able to put downward pressure on Verizon's retail rates. This is the reason that the Department requires CLECs to have the ability to contest retail markets using UNEs before it will grant Verizon pricing flexibility.

3. Verizon's Evidence Regarding Migration Procedures From UNE-P to UNE-L Does Not Rebut AT&T's Evidence That Verizon Lacks A Cost-Effective Mass Migration Procedure.

As stated above, AT&T had planned to use a method of acquiring small business customers that involved using UNE-P and then converting those customers to UNE-L. The unavailability of a forward-looking, high-volume customer cutover process at forward-looking TELRIC prices, however, has made this plan unworkable. Verizon's response to this does not address the issue that AT&T raises: the need for a *high-volume* cutover process.

Verizon asserts that it has completed over 12,300 hot cut orders in the 12 months ending July 2002. *Verizon Supplemental Response*, at 23. This volume of hot cuts hardly represents the volumes that CLECs require in a fully competitive market. This represents only 1,000 hot cut orders per month for all of Massachusetts, where there are more than 4.7 million lines in service. ATT Exh. 31, Phase I, at Table 6. *See also*, DTE-VZ RR 2, Phase I, at 2. In a fully competitive market local exchange market, the number of end-users switching local exchange carriers should be comparable to the number of end-users switching long distance carriers in the currently competitive long distance market. The number of end-users switching long distance service exceeds the 1,000 per month cited by Verizon by several orders of magnitude. Those numbers

are accommodated by computerized processes that enable swift, error free changes of competitive carriers in the long distance market. By contrast, Verizon admits that its process for the local exchange market “requires individual lines be cut one-at-a-time[.]” *Verizon Supplemental Response*, at 23. As long as Verizon continues to use the cumbersome, one-at-a-time process that it now uses, AT&T and other carriers will be unable to utilize UNE-L to provide local exchange service to business customers. Furthermore, Verizon has presented no evidence that hot cuts at the rates initially approved in Docket 01-20 could ever be commercially viable.

In response to AT&T’s evidence regarding the commercial unfeasibility of Verizon’s hot cut process and its unsuitability for mass volumes, Verizon cited to the Department’s evaluation of its Section 271 petition in D.T.E. 271 as proof that its hot-cut process is adequate. *Verizon Supplemental Response*, at 22. The Department’s determination in that case, for Section 271 purposes, does not, however, address the issue of whether the current hot cut process is commercially feasible today, including the question of whether a CLEC could ever use UNE-L to contest Verizon’s retail business services *if hot cut rates for Massachusetts are set at a level far higher than those in place at the time of the Department’s Section 271 review*.

In any event, the Department is not required to adhere forever to its prior decisions. To the contrary, the Department has substantial flexibility to reconsider existing regulatory policy in light of changed circumstances. *Boston Gas Co. v. Department of Public Utilities*, 367 Mass. 92, 104 (1975) (a decision of the Department in a particular proceeding does not become irreversible in the manner of a judicial decision constituting *res judicata*). *See also, Massachusetts Automobile Rating and Accident Prevention Bureau v. Commissioner of Insurance*, 401 Mass. 282, 287-288 (1987).

At the time of D.T.E. 99-271, there was evidence regarding Verizon's performance with respect to the hot cut process and a Department determination in that regard. There was not, nor could there have been at that incipient stage of local competition, a determination as to whether the 95% on-time performance standard that the Department used in its determination is commercially viable. At best, the Department could only guess as to whether the performance standards it used in its investigation would in fact be tolerated by the retail market.

The evidence is now in, and it conclusively demonstrates that the costs and service disruptions of a one-at-a-time, individualized hot cut process cannot be tolerated. The evidence is AT&T's decision not to acquire small business customers using UNE-L, even though it already has invested in and constructed collocation cages and many of the switches necessary to serve those customers using UNE-L. Clearly, the cost and service disruption of UNE-L are so great that AT&T prefers to pay Verizon for the switch element in UNE-P even though it has already incurred the cost of that element (and the cost of the collocation cages necessary to use that element) in its own network. In short, a business plan for competitive entry based on UNE-L failed in the retail business market, because of the hot cut process necessary to access the loop and connect it to the CLEC switch.

III. IN THE ALTERNATIVE, IF THE DEPARTMENT BELIEVES THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT AS TO WHETHER AT&T AND OTHER CLECS CAN COMPETE ON A UNE BASIS FOR THE SPECIFIC BUSINESS SERVICES IDENTIFIED BY AT&T, THEN IT SHOULD HOLD HEARINGS TO RESOLVE THEM.

In support of its argument above, AT&T has produced substantial evidence demonstrating the inability of CLECs to use UNEs to compete against Verizon business services that are carried on a DS1, or above, circuit, in the face of Verizon EEL use and commingling restrictions and Verizon's "no facilities-no build" policy. In the absence of Verizon evidence showing that CLECs are able to satisfy Verizon's safe harbors in order to offer local business

service in competition with Verizon, the Department cannot conclude that CLECs can use UNEs to compete with Verizon's business services. Similarly, in the absence of Verizon evidence showing that Verizon's "no facilities, no build" policy does not prevent CLECs from using UNEs to compete, the Department cannot conclude on the facts presented that CLECs are able to use UNEs to compete in the face of Verizon's "no facilities, no build" policy.¹⁰

Nevertheless, if the Department believes that Verizon has somehow produced evidence that creates a disputed issue of material fact as to whether UNEs are available to CLECs to compete, then the Department should hold hearings to resolve the disputed facts. Section 11 of General Laws chapter 30A ("Administrative Procedures Act") states in pertinent part (emphasis supplied):

(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.

(4) All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself *as evidence in making a decision shall be offered and made a part of the record in the proceeding*, and no other factual information or evidence shall be considered [with exceptions not relevant hereto]. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

The Administrative Procedures Act clearly contemplates that factual disputes will be resolved by the taking of evidence and the creation of a record upon which a decision will be based. In *Vitale v. Planning Board of Newburyport*, 10 Mass. App. Court 483, 487 (1980), the court held that "[a]n administrative agency may not make a decision on the basis of evidence obtained after

¹⁰ With regard to the market for small business services carried on loops at a DS0 level, AT&T has produced evidence that CLECs cannot compete using UNE-L due to the lack of a cost-effective mass migration procedure for moving customers from UNE-P to UNE-L. Verizon has produced no evidence that competition based on UNE-L is feasible.

the close of the administrative proceeding[.]” *A fortiori*, an administrative agency may not make a decision without taking evidence in the first instance. Moreover, under the Administrative Procedures Act, any evidence admitted into the record shall be subject to cross examination. *Palmer v. Rent Control Board of Brookline*, 7 Mass. App. Ct. 110, 115-116 (1979).

Accordingly, if the Department believes that Verizon has produced evidence that creates a disputed issue of material fact as to whether UNEs are available to CLECs to compete notwithstanding Verizon’s EEL use and commingling restrictions and notwithstanding Verizon’s “no facilities, no build” policy, then Massachusetts law requires that the Department hold hearings and subject Verizon’s evidence to cross examination to resolve the disputed facts.¹¹ Similarly, if the Department believes that Verizon has produced evidence that creates a disputed issue of material fact as to whether Verizon has in place a cost-effective mass migration procedure for moving end-users from UNE-P to UNE-L, so that CLECs can use UNE-L to compete, then the Department must hold hearings and subject Verizon’s evidence to cross examination to resolve the disputed facts.

IV. THE DEPARTMENT SHOULD GRANT SUMMARY JUDGMENT DISMISSING VERIZON’S COMPLIANCE FILING BECAUSE VERIZON FAILED TO COMPLY WITH THE PHASE I ORDER REQUIRING THE REDUCTION OF SPECIAL ACCESS CHARGES TO TELRIC LEVELS.

In its *Phase I Order*, the Department stated that “special access services (the wholesale input that CLECs purchase to compete with Verizon’s retail private line services) *shall be priced in the same manner as UNEs*, i.e., incremental cost plus a reasonable mark-up for indirect

¹¹ As Ms. Halloran and Ms. Waldbaum noted in DTE-ATT 2-1, Phase II, p. 10, n. 12, the New York Public Service Commission (“NYPSC”) opened a docket on September 25, 2002, to consider the impact of Verizon’s “no facilities, no build” policy in that state. The Department may wish to defer its hearing on that issue until after it has the benefit of the NYPSC decision. Such a deferral, however, may delay a final resolution in this proceeding, since the impact of Verizon’s “no facilities, no build” policy on the ability of CLECs to use UNEs must be determined before a final decision on Verizon’s compliance filing can be made.

costs.” *Phase I Order*, at 58 (emphasis added). In addition, the Department specifically required that Verizon’s compliance filing include “[a] calculation of *new prices* for switched and *special access services* [.]” *Id.*, at 105 (emphasis added).¹² The Department’s reasoning for its requirement to price intrastate access at UNE prices was sound and unassailable: Verizon’s current prices for special access services constitutes a barrier to entry which leads to Verizon retail prices that are above economically efficient levels. The Department stated:

CLECs argue that special access pricing is a barrier to entry for CLECs that want to compete against Verizon’s retail private line services because special access services impose higher costs on CLECs than are imposed on Verizon. The Department agrees. CLECs that seek to provide services in competition with Verizon’s retail private line services incur economically-inefficient wholesale costs since the wholesale inputs (special access services) that the CLECs purchase are not priced at incremental cost; rather, these inputs, because of historical universal service policies, are priced well above incremental cost. The record shows that because there is a significant cost differential between Verizon’s wholesale costs and potential entrants’ wholesale costs, entrants may have difficulty exerting downward competitive pressure on Verizon’s retail rates if Verizon raises retail prices above economically efficient levels (see Exh. ATT-2, at 11).

Id. at 61. Notwithstanding the Department’s Order and the soundness of its reasoning, Verizon states in its June 5 filing that it does not intend to price its intrastate access circuits at UNE levels as required by the Department. *Compliance Summary*, at 3.

Clearly, Verizon’s *Compliance Filing* does not comply with the Department’s *Phase I Order*. AT&T has already briefed this issue in its June 25, 2002, comments on Verizon’s compliance filing. *See, Comments Of AT&T Communications Of New England, Inc. Regarding Verizon’s June 5, 2002, Compliance Filing*, at 2-6, a copy of which is attached hereto as Exhibit

¹² *See also, Phase I Order*, at 103 (“...the Department is persuaded that ...special access rates should be reduced to UNE-based levels Verizon’s filing in Phase II should include the pricing implications of the Department’s finding that ... special access service prices should be lowered.”).

“B”. Moreover, by letter from Christopher J. McDonald, dated June 25, 2002, WorldCom briefed this issue as well. AT&T will not repeat those arguments here. AT&T relies on those arguments and incorporates them by reference as the basis for its summary judgment motion. AT&T requests that the Department dismiss Verizon’s compliance filing for failure to comply with the *Phase I Order* requirement to reduce intrastate special access charges to UNE levels.

V. ALTHOUGH NOT NECESSARY TO GRANT THIS MOTION DISMISSING VERIZON’S COMPLIANCE FILING, THE DEPARTMENT COULD EXPEDITE ITS LONG TERM GOAL OF USING MARKETS TO DISCIPLINE VERIZON PRICING POWER BY ADDRESSING THE VERIZON RESTRICTIONS AND POLICIES THAT PREVENT CLECS FROM USING UNES.

A. WHETHER OR NOT THE DEPARTMENT GRANTS THE MOTION FOR SUMMARY JUDGMENT, IT SHOULD ADDRESS THE COMPETITION INHIBITING EFFECTS OF VERIZON’S RESTRICTIVE POLICIES.

This motion asks the Department to grant summary judgment dismissing Verizon’s Compliance Filing, on the grounds that there are numerous business services that are not contestable on a UNE basis and that Verizon has failed to identify them as required by the *Phase I Order*. One of the principal reasons that many of Verizon’s retail business services are not contestable using UNES is because of its EEL use restrictions. The presence of such restrictions, therefore, is a substantial ground for granting the motion. The Department, however, may wish to move beyond the issue raised by the motion and address head on the underlying problem of EEL use restrictions. After that problem and others identified here are solved, then Verizon’s services may well be contestable on a UNE basis. Accordingly, whether or not this motion is granted (and especially if it is not granted), the Department should establish a Phase III of this proceeding to address the obstacles to obtaining UNES, so that Verizon’s retail business prices will reflect the results of full and fair competition. Should the Department fail to establish a Phase III, AT&T reserves its right to petition in its own right for such relief.

B. CONTRARY TO VERIZON’S CONTENTIONS, THE DEPARTMENT HAS JURISDICTION TO ESTABLISH A SET OF SAFE HARBORS THAT IS DIFFERENT FROM THOSE ESTABLISHED BY THE FCC.

In the *Verizon Supplemental Response*, Verizon contends that the Department may not establish a set of safe harbors different from those established by the FCC. Verizon makes two arguments. First, it relies on the Department’s decision in D.T.E. 01-34 finding that the FCC’s jurisdiction over special access circuits with mixed interstate and intrastate traffic is exclusive and analogizes a state’s unbundling authority to the (lack of) a state’s right to assert jurisdiction over special access circuits with more than 10% interstate traffic. *Id.*, at 7-8. Second, it makes the tired, old arguments – now proven wrong – that only the FCC can define unbundled network elements. *Id.*, at 8-9. Both of Verizon’s arguments are wrong. For ease of presentation, AT&T addresses Verizon’s arguments in reverse order.

1. The Department Has Authority Under State Law to Define Loop and Interoffice Network Elements in a Way That Permits Them to Be Used to Provide Bundled Local and Long Distance Service.

Even if Verizon were correct that the FCC alone can and has properly defined ILEC obligations under the 1996 Act (a legal conclusion that AT&T does not concede), Verizon’s argument is beside the point. Apart from its authority under the 1996 Act, the Department can act pursuant to its authority under state law to create unbundled network elements, so long as such action does not interfere with the objectives of the 1996 Act to further competition in the local exchange market.

The Department has broad authority under G.L. c. 159 to regulate the manner in which Verizon operates its network. *See, e.g.*, D.P.U. 94-50 at 116; D.P.U. 89-20 at 17; *see also* D.T.E. 01-34, *Vote and Order to Open Investigation* at 2-3 (March 14, 2001). Prior to the passage of the Telecommunications Act of 1996, the Department found that it had the power to investigate the unbundling of and interconnection with Verizon’s network elements. *See* D.P.U. 94-185,

Vote to Open Investigation at 3-5 (Jan. 6, 1995). Moreover, after passage of the 1996 Act, it has been determined that Section 251(d)(3) of the 1996 Act prohibits the FCC from interfering with the Department's right to establish access and interconnection obligations that are consistent with Section 251 and the pro-competitive policies of the 1996 Act. *See, Hearing Officer Ruling On Resuming The Procedural Schedule*, October 18, 2002, D.T.E. 98-57, Phase III, at 7.

Congress has specifically provided that the Department may exercise its authority under state law to impose additional requirements upon Verizon, so long as those requirements are "not inconsistent" with any federal rules. 47 U.S.C. § 261(c); *see also* § 251(d)(3), 252(e)(3). Thus, "the language of the 1996 Act compels the conclusion that Congress did not intend to occupy the field of telecommunications regulation, and that it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act." *Petition of Verizon New England, Inc.*, 795 A.2d, 1196, 1200 (Vt. 2002). Under these circumstances, federal regulations established by the FCC only set the floor for unbundling and access requirements. *See, e.g., Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 170-171 (2000). There is no conflict between state and federal law, and thus no preemption, when it is possible to comply with both sets of regulations. *See, e.g., Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 550 (1985).

This principle was recently confirmed by the Vermont Supreme Court, which affirmed an order by the Vermont Public Service Board requiring Verizon to offer CLECs combinations of UNEs that were ordinarily combined and to resell voice mail as a telecommunications service. *See, Petition of Verizon New England*, 795 A.2d at 1204, 1207-08. Significantly, the Court stressed that the Board's order would be lawful even if "federal law does not require such combinations" of UNEs. *Id.* at 1204. Because nothing in federal statutory or regulatory

provisions *prohibits* an ILEC from offering the type of combined UNEs at issue, no conflict between federal and state law could exist. *Id.* As the Court explained, “the federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act.” *Id.* at 1204. So long as Verizon is capable of complying with state and federal requirements simultaneously, state regulations are valid and not preempted by federal law. *Id.* at 1204-1205.

The Department’s prerogatives are just as broad as those of the Vermont Board. Here, there is no question that Department action requiring Verizon to provide unbundled loops and interoffice transport facilities to CLECs in accordance with a local usage test that can be satisfied more easily than that prescribed by the FCC is not inconsistent with federal law. The FCC’s *Supplemental Remand Order*¹³ and *Supplemental Order Clarification*¹⁴ upon which Verizon relies (*Verizon Supplemental Response*, at 8) does not **require** Verizon to impose the use restrictions reflected in the three “Safe Harbor” certifications. It merely **permits** an ILEC to do so. Certainly, the FCC does not prohibit an ILEC from offering UNEs in accordance with a less restrictive usage test. Thus, Verizon may remove or make less restrictive its use restrictions on combined loop and interoffice transport facilities without violating a federal law, just as it has done in New York. *See*, discussion at 38-40, *infra*. A Department order requiring Verizon to do so, therefore, would not require Verizon to do anything that violates federal law or FCC rules. A Department order to that effect, therefore, would not be inconsistent with federal law.

¹³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, FCC 99-370, CC Docket No. 96-98 (Nov. 24, 1999) (“*Supplemental Remand Order*”)

¹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 (June 7, 2000) (“*Supplemental Order Clarification*”)

Indeed, federal law expressly contemplates a Department order providing access to unbundled network elements on terms at least as or more favorable than those prescribed by the FCC. Congress expressly limited the FCC's jurisdiction over regulations establishing conditions of access and interconnection to leave room for the states to act. After setting forth the standards that *the FCC* must use in determining what network elements should be made available (§ 251(d)(2)), Congress stated that “the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . establishes access and interconnection obligations of local exchange carriers” provided that the state regulations are consistent with § 251 and the procompetitive policies of the 1996 Act.

There can be no reasonable doubt that by express provisions of the 1996 Act, the FCC's jurisdiction over the determination of what constitutes local usage is not exclusive, and that the Department may establish a different local usage test so long as that test allows access to UNEs and interconnection on terms at least as favorable as the FCC.

2. Verizon's Usage Test in New York Demonstrates That Verizon's Analogy To Exclusive FCC Jurisdiction Over Mixed Use Special Access Circuits Is Flawed.

In the *Verizon Supplemental Response*, Verizon cites to D.T.E. 01-34, *Order on AT&T's Motion to Expand Investigation*, at 10 (August 9, 2001) (“*D.T.E. 01-34 Interlocutory Order*”), in support of its contention that the Department may not establish a set of safe harbors different from those prescribed by the FCC for purposes of defining unbundled loops and transport combinations available at TELRIC rates. *Id.*, at 7-8. Verizon's reliance on *D.T.E. 01-34 Interlocutory Order* is misplaced.

The *D.T.E. 01-34 Interlocutory Order* addressed the issue of whether a state could assert jurisdiction over any aspect of special access service when the traffic on the circuit is more than 10% interstate. The Department determined that the FCC has *exclusive* jurisdiction over special

access circuits with greater than 10% interstate traffic. *Id.*, at 10-11. Accordingly, even if Verizon voluntarily agreed to provide special access circuits with more than 10% interstate traffic under state tariff, the Department would not have jurisdiction to approve, or allow to go into effect, such a tariff. Indeed, Verizon made precisely this point in *Comments Of Verizon Massachusetts*, filed in D.T.E. 01-34 on April 23, 2001, when it stated that “the FCC has determined that these services *must* be tariffed at the federal level.” *Id.*, at 10 (emphasis in original).¹⁵

In stark contrast to the FCC’s assertion of exclusive jurisdiction over special access circuits carrying more than 10% interstate traffic, the FCC’s safe harbor test does not purport to prevent an incumbent from offering as unbundled elements combinations of loop and transport facilities for any mix of local and interstate traffic, if they so desire. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, FCC 99-370, CC Docket No. 96-98 (Nov. 24, 1999) (“*Supplemental Remand Order*”) (“we . . . now **allow** incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements”) (emphasis supplied). Indeed, Verizon availed itself of the right to

¹⁵ In footnote 8 to Verizon’s text, Verizon listed its authority and support for this proposition:

“*See MTS and WATS Market Structure Order*, at ¶ 9 n.13 (“[W]e are directing the LECs to revise their interstate access tariffs to specify, consistent with the terms of this Order, when a customer may obtain special access from that tariff. . . . We will expect the LECs to enforce these tariff provisions as required by Section 203 of the Communications Act, 47 U.S.C. § 203.”). As the FCC explained in a more recent order, special access is an “interstate service that is properly tariffed at the federal level.” Memorandum Opinion and Order, *GTE Tel. Operating Cos.*, 13 FCC Rcd 22466, ¶ 16 (1998); *see id.* ¶ 25 (“We agree that GTE’s ADSL service is a special access service, thus warranting federal regulation under the ‘ten percent’ rule”); *see also* Verizon (Bell Atlantic) Tariff FCC No. 11, § 2.3.10(D)(1)(b) (providing that where “interstate Special Access traffic on the service (line) involved constitutes more tha[n] ten percent of the total traffic on the service (line), the service (line) is considered to be jurisdictionally interstate and will be provided in accordance with the applicable rates and regulations in this tariff”).”

offer loop-transport combinations with less restrictive use restrictions under state authority in New York. *See*, DTE-ATT 2-1, at 11-12 (Ms. Halloran and Ms. Waldbaum describe New York usage test). Verizon states in the *Verizon Supplemental Response* that its offering of loop-transport combinations with less restrictive use requirements was “a voluntary commitment made by Verizon New York . . . in its pre-filing statement for its Section 271 application (Case No. 97-C-0271).” *Verizon Supplemental Response*, at 9. Verizon’s voluntary offering under state tariff of UNEs that do not meet the FCC’s usage test demonstrates that the FCC’s jurisdiction is not exclusive.

In sum, Verizon’s offering of loop-transport combinations with use restrictions under state tariff in New York that are less restrictive than those of the FCC demonstrates that the FCC jurisdiction over what constitutes local usage for purposes of defining UNEs is not exclusive.

3. The Department Should Set A “Local Usage” Standard That Permits CLECs To Order Loop-Transport Combinations As UNEs When Providing Local Service.

Currently, the vast majority of *local* listings in the E911 database are served by special access circuits. *See*, discussion at 20-22, *supra*. Moreover, Verizon has relied on these special access circuits to demonstrate *local* competition. Clearly, there is a problem with a local usage test that does not permit CLECs to order loop-transport combinations as UNEs when they are providing the local service to which Verizon points to prove local competition. To address this problem, the Department should open a Phase III of this proceeding, whether or not the Department grants this motion for summary judgment.

Only when Verizon’s competitors are able to use the network in the same way as Verizon does to serve its local customers – free of artificial regulatory restrictions on usage – will there be real competition in local exchange markets. AT&T believes, therefore, that the Department can and should immediately order Verizon to remove its use restrictions entirely. However, if,

contrary to AT&T's recommendation, the Department were to decide that some type of UNE use restrictions should remain in place, Phase III should include the consideration of UNE use restrictions that can – unlike the FCC use restrictions – be satisfied from a technical point of view.

In such an investigation, the Department can look to the considerable effort that the NYPSC has already devoted to this issue. In New York, although the NYPSC established restrictions on the use of EELs intended to ensure that they are used “to transmit primarily local exchange traffic,” it established a test that can be satisfied as a practical and administrative matter. *Order Denying Rehearing and Clarifying Primarily Local Traffic Standard* (issued and effective August 10, 1999) (“Primarily Local Traffic Standard Order”), at 11. The NYPSC stated:

In order to qualify for the EEL rate, a rate more favorable than the special access rate, the March 24 Order requires that EELs at and above the DS1 or T-1 level must be used to transmit primarily local exchange traffic. The primarily local standard will consist of a channel count test at the transport and loop level. When some local traffic is carried on 50% or more of DS1 level and above loop channels that are connected to a transport facility, the transport will qualify for EEL rates as will the loops, to the extent loops service customers whose local needs are being satisfied by the EEL circuit. If the primarily local standard for transport is not met, then the EEL rates would apply only to those loops meeting the standard; i.e. for loops of DS1 level and above, some local traffic must be carried on 50% of the channels on the loop circuit.

Id. See also, DTE-ATT 2-1, Phase II, at 11. Thus defined, the New York local usage definition is simple and implementable. It requires some local traffic on 50% or more of DS1 loop channels, but it does not require that the CLEC or the customer measure the quantity of such usage. This test can be satisfied in many cases because carriers such as AT&T do not segregate T1.5 channels. *Id.*, at 11-12. Hence, if the customer is purchasing local service from AT&T on this circuit, all of the channels will have some local traffic. *Id.*

In summary, the Department has the authority to require Verizon to provide to telecommunications carriers as UNEs the loop and interoffice facilities that make up special access when used to provide local service *as defined by the Department*. The Department should open a Phase III in this proceeding to determine a practical, implementable standard for determining when local usage is sufficient to constitute primarily local service. If the Department does not initiate such a proceeding as part of this docket, AT&T reserves its right to petition the Department to open a new docket to address this essential precondition for efficient local competition.

Conclusion

AT&T requests that the Department grant this motion for summary judgment and dismiss Verizon's compliance filing, because Verizon has not presented evidence refuting AT&T's evidence that Verizon failed to list numerous business services that are not contestable on a UNE basis. In the alternative, if the Department believes that Verizon has produced sufficient evidence to raise an issue of fact as to whether certain business services are contestable on a UNE basis, then the Department must create a record by holding hearings and accepting evidence subject to cross examination in order to resolve the disputed issues of fact. Finally, the Department should grant summary judgment because Verizon failed to comply with the *Phase I Order* requiring Verizon to reduce rates for intrastate special access circuits to UNE levels.

Respectfully submitted,

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